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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL IVAN MOLINA,

Defendant and Appellant.

B210503

(Los Angeles County  
Super. Ct. No. BA271207)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Bob S. Bowers, Jr., Judge. Affirmed as modified.

George L. Schraer, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D.  
Matthews and Timothy M. Weiner, Deputy Attorneys General, for Plaintiff and  
Respondent.

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This appeal arises from a criminal case involving two gang-related, drive-by shootings. A jury convicted Michael Molina of one count of first degree murder in the first shooting (Pen. Code, § 187, subd. (a)) and three counts of attempted premeditated murder in the second shooting. (Pen. Code, §§ 664/187, subd. (a).) The guilty verdicts on the murder and attempted murder counts included findings that Molina personally discharged a firearm which caused the victim's death, that a principal personally discharged a firearm which caused the victim's death (Pen. Code, § 12022.53, subds. (d) & (e)), and that the crime was committed for the benefit of a criminal street gang. (Pen. Code, § 186.22, subd. (b)(1)(A).) The trial court found true that Molina suffered a prior strike conviction. We affirm all of Molina's convictions, modify his sentence, and remand the cause for a corrected abstract of judgment.

### **FACTS**

On May 6, 2004, Byron "Dext" Castro, a member of a "tagging crew" known as "M.R.E.," played basketball at a local elementary school with a group of neighborhood friends, Marcus "Flip" Warren, Christian "Rush" Rodriguez, and Nestro "Trave" Castro (the attempted murder victims), and Jonathan "Theus" Villanueva (the murder victim), all of whom were members of a tagging crew known as "M.D.K."<sup>1</sup> After the group finished with their game, they informally arranged to rejoin after Byron and Jonathan met up with Byron's sister, Mayrin Castro.

As Byron, Mayrin, and Jonathan were walking on Catalina Street in the direction of their friends, a Blazer occupied by five members of the "3AK" a criminal street gang (for "3rd Avenue Killers") drove past. Theodore Johnson was driving the Blazer; Molina sat in the front passenger seat; Brian Bastidas, Mynor "Drek" Rubio, and Jose "Daze" Duarte were in the backseat. Johnson drove the Blazer down Catalina Street until it reached a dead-end, where Molina told Johnson to "go back around." Johnson made a U-turn, and headed back toward Byron, Mayrin and Jonathan.

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<sup>1</sup> For clarity of presentation, we refer to the victims by their first names.

Near the intersection of Catalina Street and 36th Place, the Blazer drove up from behind Byron, Mayrin, and Jonathan, and stopped alongside them. Molina leaned out the front passenger window, and said, “Where are you from?” or “What do you write?” After Byron responded, “M.R.E.,” Molina turned his attention to Jonathan. As Johnson backed up the Blazer, Molina asked Jonathan where he was from, and Jonathan replied, “M.D.K.” At that point, Molina said, “Come here, I got something for you.” He then pulled out a revolver and shot Jonathan three times. Jonathan died from a gunshot wound caused by a bullet that entered his chest by his left armpit, and exited the right side of his chest.

After Molina shot Jonathan, Johnson drove the Blazer around a “couple” of turns to a location on Budlong Avenue, near 36th Place, a little more than a block away, where Marcus, Nestor, and Christian were hanging out. As Johnson drove the Blazer by Marcus, Nestor and Christian, Molina put his body halfway out the front passenger window, and fired three shots in their direction over the roof of the vehicle. As the Blazer sped away, a hat that Molina was wearing flew off his head, and was left behind at the scene of the shooting.

Shortly after the shootings, Byron and Mayrin Castro identified Jose Duarte as the shooter from police photo line-ups. Duarte, Bastidas, and Johnson were taken into custody.

In early 2006, Bastidas pleaded guilty as an accessory; he served one and one-half years in county jail. The People filed a juvenile petition against Duarte, and, in November 2005, he admitted to a murder charge in exchange for his promise to testify on behalf of the People, and an agreement that he would be released from custody no later than this 25th birthday. Bastidas and Duarte both testified for the prosecution at Molina’s trial, and both identified Molina as the shooter.

Molina fled to Minnesota after the shootings. In November 2004, Molina was arrested at an apartment complex in Bloomington, Minnesota. At the time of his arrest, Molina said that he name was “Isaiah Villanuevo.” When an officer said that they knew his name was not “Villanuevo,” Molina replied, “Okay, you got me.”

Los Angeles Police Department Detective Robert Lait traveled to Bloomington for Molina's arrest, and interviewed Molina's sister, Catherine Molina, who said that Molina had taken the name "Isaiah Villanuevo" because he knew he was "wanted for murder" in Los Angeles. Catherine Molina said that Molina had admitted to her that he had been "in the car" at the time of the shootings, and that he gave a general description of the events, including that there had been five members of the 3AK gang involved, and that "T.J." had been driving.

In January 2005, the People filed an information charging Molina with one count of first degree murder (Pen. Code, § 187, subd. (a)) and three counts of attempted premeditated murder (Pen. Code, §§ 664/187, subd. (a)). On each count, the information alleged: that appellant personally and intentionally used and discharged a handgun causing great bodily injury and death within the meaning of Penal Code sections 12022.53, subdivisions (b), (c), and (d); that a principal personally and intentionally used and discharged a handgun causing great bodily injury and death within the meaning of Penal Code sections 12022.53, subdivisions (b), (c), (d), and (e)(1); and that the offenses were committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members, within the meaning of Penal Code section 186.22, subdivision (b)(1)(A).

At a jury trial in spring 2008, the People presented evidence establishing the facts summarized above. Molina presented evidence suggesting that Duarte was the shooter. Despite their pre-trial photo identifications of Duarte as the shooter, at trial, Byron and Mayrin Castro identified Molina as the person who shot Jonathan.

The jury returned verdicts finding Molina guilty as charged. The trial court found true that Molina suffered a prior conviction within the meaning of the "Three Strikes" law. After sentencing, the clerk of the court prepared and filed an abstract of judgment stating that Molina's "total sentence is 165 years to life."

## **DISCUSSION**

### **I. Molina's Request To Retain Private Counsel**

Molina contends the judgment encompassing his convictions and sentence must be reversed because the trial court improperly denied his request to retain private counsel of his choosing. We disagree.

#### **A. The Right To Retain Private Counsel**

A criminal defendant has a constitutionally protected right to retain counsel of his or her choice, and, for that reason, a trial court must undertake all “reasonable efforts” to assure that a defendant who has the financial resources to retain a chosen lawyer can be represented by that lawyer. (*People v. Courts* (1985) 37 Cal.3d 784, 789-790.) A key element in addressing a request to retain private counsel, however, is the reasonableness of the efforts and accommodation necessary to assure the defendant's choice. A trial court may, in the exercise of judicial discretion, deny such a request when the defendant has been unjustifiably dilatory in attempting to obtain counsel, with a continuance of trial being an inherent result of the new representation, or when the orderly administration of justice otherwise outweighs an accommodation of the defendant's request. (*Id.* at p. 790; and see, e.g., *People v. Blake* (1980) 105 Cal.App.3d 619, 623-624.)

A reviewing court does not apply a “mechanical test” in determining whether a trial court properly denied a defendant's right to retain private counsel; each case must be decided on its own facts. The defendant bears the burden to show an abuse of discretion. (*People v. Blake, supra*, 105 Cal.App.3d at pp. 623-624.) Where a reviewing court finds that the trial court improperly denied a defendant's request to retain private counsel, the error requires reversal regardless of whether or not the record shows that the defendant's ensuing trial was “fair.” (*People v. Courts, supra*, 37 Cal.3d at p. 796.) In short, an erroneous denial of a request to retain private counsel is reversible per se.

#### **B. The Trial Court Setting**

The record establishes the following context for Molina's request to retain private counsel in this case:

- In January 2005, private counsel Stephen Rodriguez represented Molina at his preliminary hearing and arraignment.
- In May 2005, attorney Rodriguez “substituted out,” and private counsel Matthew Fletcher “substituted in.”
- In October 2005, the trial court set the case for jury trial in November 2005.  
The court thereafter continued the trial on several dates until it came to be set to commence in August 2006.
- On Thursday, August 18, 2006, the People called their first witness. Midway through the following week, the trial court granted a defense motion for mistrial “[d]ue to late discovery.”
- On October 23, 2006, the trial court called Molina’s case for jury trial, but private counsel Matthew Fletcher indicated that he was engaged in another trial.
- On October 25, 2006, the trial court called Molina’s case for jury trial, but private counsel Fletcher did not appear.
- On October 26, 2006, the trial court called Molina’s case for jury trial. Another attorney appeared, “standing in for [private counsel Fletcher].” The court again put over Molina’s trial.
- On November 3, 2006, the trial court called Molina’s case for jury trial. Molina was present, “represented by Ivan Shomer private counsel appearing for Matthew Fletcher” who continued to be “engaged in trial . . . .” The court trailed the matter to November 9, 2006.
- On November 9, 2006, private counsel Matthew Fletcher asked the trial court to “appoint him” on Molina’s case, and the court “list[ed] the items needed for [its] consideration in that matter.” Due to the trial court’s unavailability, Molina’s trial was continued.
- On January 17, 2007, the People and Molina, still represented by private counsel Matthew Fletcher, announced ready for trial.

- On January 31, 2007, the trial court put in an order for a panel of prospective jurors to be ready to go for trial. Molina continued to be represented by private counsel Matthew Fletcher.
- On February 1, 2007, the trial court began hearing prospective jurors' requests to be excused from service for "hardship," and calendared further hearings on the matter for February 5, 2007. On February 5, 2007, the "hardship" proceedings continued.
- On February 6, 2007, private counsel Matthew Fletcher and the trial court engaged in a discussion regarding the availability and cost of reporter's transcripts from a related proceedings involving Theodore Johnson (the alleged driver). When the court indicated that Fletcher would need to work out those matters with the court reporter, Fletcher renewed his request to be appointed as Molina's counsel, and also moved to be relieved as counsel of record, explaining he could not continue "spending thousands of dollars . . . out of [his] own pocket." At the close of the discussion, the trial court granted Fletcher's request to be relieved, and issued an order for the appointment of the Alternate Public Defender to represent Molina. The prospective jurors were excused.
- On February 20, 2007, the Alternate Public Defender declared a conflict, and the trial court appointed Bar Panel counsel Jonathan Roberts to represent Molina. Over the course of the ensuing year, the trial court regularly continued Molina's trial.
- At a pretrial conference on February 27, 2008, an attorney specially appeared in the trial court, and presented a request from Molina's previous private counsel, Matthew Fletcher, to "sub in" as Molina's attorney. The trial court denied the request without hearing from Fletcher himself.
- On March 18, 2008, attorney Matthew Fletcher appeared in the trial court to state his case for substituting in as Molina's trial counsel. The court denied the request at that point, but indicated that Fletcher would "no doubt" be allowed to substitute

in the event he showed up on the day of trial (April 4, 2008), and announced that he was ready to proceed.

- On April 2, 2008, Molina’s lawyer of record, Bar Panel counsel Jonathan Roberts, filed a written motion to continue Molina’s trial on the ground that Molina had a constitutional right to retain private counsel of his choosing, and had expressed a desire to be represented by Mathew Fletcher.
- On April 4, 2008, the trial court denied the defense motion for a continuance.
- On April 7, 2008, the trial court began voir dire. Bar Panel counsel Jonathan Roberts represented Molina throughout trial.

### **C. Analysis**

The history of Molina’s case defeats his contention that the trial court abused its discretion in proceeding with a jury trial in April 2008, with Bar Panel counsel Jonathan Roberts providing Molina’s defense. Simply put, the record does not support Molina’s argument that the trial court’s decision to deny his request to re-retain private counsel Matthew Fletcher shortly before the second trial rests on an unreasonable balancing of Molina’s right to retain private counsel, on the one hand, and the interests in the orderly administration of justice, on the other side. To make our point, we expand on the history summarized above.

On February 27, 2008, an attorney, Jaclin Awad, appeared in the trial court, and presented a request from attorney Matthew Fletcher to “sub in on [Molina’s] case.” The court denied the request, citing the “long history” of Molina’s case, and Ms. Awad then made this proposal on Mr. Fletcher’s behalf: “If the court wants to keep the March 17th zero of 20 date, Mr. Fletcher has previously announced ready for this case. [¶] It is only a matter of refamiliarizing himself with this case. Mr. Molina has a right to [private] counsel. Prior monetary reasons inhibited him from proceeding with Mr. Fletcher. . . . [¶] Mr. Fletcher has the ability I believe to be ready within the time frame of March 17th as a zero of 20th day to proceed in this matter. . . .” After listening to Ms. Awad’s offer, the trial court agreed to accept Molina’s time waiver (which he gave), and to “go over to March 17th as zero of 20,” with this advisement: “If Mr. Fletcher is here



on March 17th and assures the court that he will proceed within that time frame, the court will take that under consideration.”

On March 17, 2008, the trial court “trailed” the matter to March 18, 2008. The court’s minute order from March 17, 2008, does not reflect an appearance by attorney Matthew Fletcher. There is no reporter’s transcript to explain the reason for the one-day delay. On March 18, 2008, attorney Fletcher appeared in the trial court, and the following exchange occurred:

“THE COURT: Okay. Mr. Fletcher . . . let me explain to you what I intend to do. . . . [¶] *The last day on this matter is April 7th, 2008. . . . [¶] Now, on April 7th, 2008, I’m reserving a jury panel, and they will be out front of [the courtroom]. On April 7th, 2008, if you walk into the courtroom and say you’re prepared to go to trial on that day, you will be substituted in. No hands — no doubt. If [you do] not come in or [do] not wish to proceed at that point, Mr. Roberts will go forward at that point.* [Emphasis added for purposes of appellate discussion.] . . . [¶] . . . All right. We’ve had a discussion at sidebar on his matter. I think it’s been agreed . . . between Mr. Roberts and [the prosecutor] at this point that this matter will come back April 4th, 2008, for trial on that date. [¶] Is that the understanding, Mr. Roberts?

MR. ROBERTS: That’s my understanding. Can I get a representation from Mr. Fletcher on the record as well that it is his expectation to show up on [April] 4th?

THE COURT: Here’s what I have to say. I have no jurisdiction on Mr. Fletcher.

MR. ROBERTS: It’s a weird situation.

THE COURT: It’s not weird at all. What I’m saying to you, Mr. Roberts, you, as attorney of record on this matter, I expect that you will go forward [and] at his point at least it’s between you and Mr. Fletcher to tell us what happens in this matter, but as far as the court is concerned, the matter will

be in trial status; so one of the two of you will go forward on that date.

April 4th is agreed with the People.”

Rather than an appearance by Mr. Fletcher on April 4, 2008, and an announcement that he was then ready for trial, a different series of events transpired. On April 2, 2008, Bar Panel counsel Jonathan Roberts filed a written motion, calendared to be heard on the day set for the start of trial (April 4, 2008). The motion requested the court to continue the start of trial “from the present last day, April 7, 2008, to April 14, 2008,” so that Molina could “be represented by his counsel of choice[,]” referring to Mr. Fletcher.

On the day of trial, Friday, April 4, 2008, Mr. Fletcher did not appear, and, in his absence, the trial court and Bar Panel counsel Jonathan Roberts engaged in an extended discussion of the latter’s motion for a continuance of the trial date. The trial court denied the motion for the following reasons: “I’m perfectly confident with the history of this trial. [¶] I would not go forward, . . . if I didn’t feel confident at this point. . . . [T]he court again has bent over backwards. And so there is no doubt in the court’s mind that sufficient time has been given for everybody who is interested in doing this case to proceed. [¶] And, again, primarily one of the reasons you [Mr. Roberts] happen to be the attorney that was appointed from ICDA is again the court was concerned with Mr. Molina’s rights and that fact that Mr. Fletcher voluntarily left the case. [¶] He was given an option, and he chose to do something else. And now he apparently appears on the periphery, but he never makes any formal commitments. . . . [¶] Again if he were here right now saying, judge, I’m ready to go, he would be substituted in. He is not. For that reason, we are going to go forward.”

During the remainder of the discussion on Friday, April 4, 2008, Mr. Roberts regularly cited Molina’s right to retain private counsel of his choosing, and implored the court to accommodate a short delay in the start of trial. Mr. Roberts acknowledged that Mr. Fletcher had “become engaged [in another trial] on Tuesday,” and that the trial was “estimated to last 7 to 10 days,” but added that it might end “by Wednesday or Tuesday of next week . . . .” When the court expressed a concern that Molina’s trial might end up being continued over-and-over, Mr. Roberts stated that he understood the court’s

concern, and suggested that, because “sometimes [the court got] in a situation [of] waiting for [Mr. Fletcher],” an alternative to an outright continuance of trial would be to “consider trailing the case day by day.” The court rejected the proposal, stating that it did not “think it [was] something that [was] practical at [that] point.”

On Monday, April 7, 2008, the trial court, prosecutor, and Bar Panel counsel Jonathan Roberts began voir dire of a panel of prospective jurors. Mr. Fletcher did not appear. On Tuesday, April 8, 2008, voir dire resumed, and concluded during the afternoon session. Mr. Fletcher did not appear. Opening statements began late in the day on Tuesday, April 8, 2008. The People called their first witness on Wednesday morning, April 9, 2008. The jury returned its verdicts on May 5, 2008.

We are not persuaded that the trial court abused its discretion in denying Molina’s request to re-retain Mr. Fletcher as his private counsel. First, the record shows the court provided a fair opportunity for Mr. Fletcher to substitute in as Molina’s attorney, right up to the day of trial, but Mr. Fletcher, apparently due to a heavy workload, was never able to commit to trying Molina’s case on any other schedule than his own. Second, the record belies a concrete conclusion that Mr. Fletcher was “ready” to act as Molina’s trial lawyer. At the time of the first re-infusion of Mr. Fletcher back into the trial picture, i.e., at the time of the hearing on February 27, 2008, not only did another lawyer appear on behalf of Mr. Fletcher to express his interest in subbing back in, which in-and-of-itself evidences a suggestion that his workload difficulties precluded him from devoting complete attention to Molina’s case, but that other attorney also openly stated at that hearing that Mr. Fletcher needed to “refamiliarize” himself with the case to be ready. Third, we see nothing definitive in the record *from Mr. Fletcher* showing that he was “ready” to go to trial in April 2008, or within any reasonable time thereafter. On the day of trial, Friday, April 4, 2008, Mr. Roberts stated that Mr. Fletcher had just begun another trial three days earlier. In addition, Mr. Roberts’ motion for a continuance, filed on April 2, 2008, and requesting that trial be continued to April 14, 2008, was not supported by a declaration from Mr. Fletcher stating his readiness. And, although we see a notation in one minute order to the effect that Mr. Fletcher had, at some point, indicated he was

ready for trial, we do not see an open, express assertion to that effect from Mr. Fletcher in any of the reporter's transcripts. Finally, the trial court expressly advised Mr. Fletcher that, if he showed up on the day of trial, ready to go, then the court would allow him to substitute in as Molina's attorney, "no doubt." The interference with Molina's right to retain private counsel was not one caused by the trial court, which stood ready to allow an available attorney to represent Molina at trial.

Molina's right to a fair opportunity to retain private counsel is shown to have been trumped by the countervailing interest in proceeding with his trial in an orderly fashion, taking into account the practical difficulties of assembling witnesses, lawyers, and jurors at the same time and at the same place. (*People v. Ortiz* (1990) 51 Cal.3d 975, 983-984.) The record presented to us for review, taken as a whole, strongly convinces us that the trial court had good reason to be concerned about an open-ended continuance of Molina's trial, and, for that reason, we find the trial court did not abuse its discretion in denying the request to re-retain Mr. Fletcher. (*People v. Crovedi* (1966) 65 Cal.2d 199, 207, fn. 4 [" 'It is manifest that the courts cannot in every case await the convenience of some attorney before they can function. Reduced to its lowest terms this would allow a popular attorney to have the courts marking time to serve his [or her] convenience.' "].) In short, we disagree that the trial court failed to take reasonable efforts to ensure that Molina could be represented by Mr. Fletcher. (*People v. Crovedi, supra*, 65 Cal.2d at p. 207.)

## **II. Consecutive Sentencing**

Molina contends the abstract of judgment must be corrected to conform to the trial court's pronounced sentence. More specifically, Molina argues the abstract of judgment should reflect that the term on his attempted murder conviction in count 2 should be concurrent, not consecutive, to the term on his count 1 murder conviction. This result is required, argues Molina, because the trial court did not expressly state that the term imposed on count 2 was to be served consecutively to the term on count 1. We disagree.

Penal Code section 669 prescribes rules governing concurrent and consecutive terms. In pertinent part, it provides: "When any person is convicted of two or more crimes . . . [the sentencing court] *shall direct* whether the terms of imprisonment or any

of them to which he or she is sentenced shall run concurrently or consecutively. . . .

[¶] Upon the failure of the court *to determine* how the terms of imprisonment . . . shall run, the term of imprisonment . . . shall run concurrently.” (Italics added.) Penal Code section 669 is interpreted to prescribe this rule: if a sentencing court fails to pronounce at the time of sentencing that the terms on multiple convictions are to run consecutively, then the terms are deemed to run concurrently as a matter of law. (See, e.g., *People v. Downey* (2000) 82 Cal.App.4th 899, 912-915; *People v. Rogers* (1967) 252 Cal.App.2d 1015, 1017-1018.)

At the sentencing hearing, the trial court pronounced sentence on the murder conviction in count 1, and then stated that, as to the attempted murders “set forth in counts 2, 3 and 4 of the information, the defendant is sentenced to the state prison . . . for the term of 30 years to life as to each count.” The court then pronounced the terms on the ancillary findings as to the attempted murder counts, immediately following which the court stated that the “terms imposed for counts 3 and 4 shall run concurrent with the term imposed for count 2.”

Molina argues the trial court’s failure to use the specific word “consecutive” when imposing sentence on count 2, means the sentence for that term must be concurrent. The People argue that consecutive terms may be sustained on appeal where the record establishes that the court “intended” to impose consecutive terms, relying on *People v. Edwards* (1981) 117 Cal.App.3d 436, 452. We believe the court’s language is easily interpreted to show that the court intended to sentence Molina to a consecutive term on count 2. The court indicated that the sentences on counts 3 and 4 were to run concurrent to the sentence imposed on count 2, indicating that the sentence on count 2 was to be handled in a different manner. The minute order also reflects the court imposed a consecutive sentence on count 2. Given this state of the record, we believe the trial court intended a consecutive sentence as to count 2, and reject Molina’s claim that the word, “consecutive” must be uttered by a trial court to bring such a sentence into effect.

### III. Correction of Unauthorized Sentence

The abstract of judgment states that Molina's "total sentence is 165 years to life." Molina contends the abstract of judgment "should be corrected by reducing the number of years by either 40 or 90 years." The People, on the other hand, argue the case should be remanded for a new sentencing hearing because the sentence imposed on Molina's firearm allegations in counts 3 and 4 sentence reflects an "incongruity" which makes for an unauthorized sentence. We believe Molina's argument has merit.

When imposing sentence for the firearm allegations, the court stated: "[t]he allegation that the defendant personally discharged a firearm during the commission of said crime within the meaning of Penal Code section 12022.53 (c), having been found true as set forth in counts 2, 3, and 4 of the information, the defendant is sentenced to the state prison for an additional term of 20 years as to each count, such term to be served consecutive to the terms imposed for counts 2, 3, and 4."

The abstract of judgment reflects the trial court sentenced Molina as follows:

Count 1 (murder)	50 years to life, plus 25 years to life for discharging a firearm causing death, consecutive to the 50 to life term;
Count 2 (attempted murder)	30 years to life, consecutive to count 1, plus 20 years for discharging a firearm, consecutive to the 30 to life term;
Count 3 (attempted murder)	30 years to life, concurrent to count 2, plus 20 years for discharging a firearm, <i>consecutive to the concurrent 30 to life term</i> ; and
Count 4 (attempted murder)	30 years to life, concurrent to count 2, plus 20 years for discharging a firearm, <i>consecutive to the concurrent 30 to life term</i> .

We agree with the People's observation that the trial court's statements can be interpreted to have created an incongruity when it affixed *consecutive* 20-year enhancements to Molina's convictions on counts 3 and 4, where it had imposed *concurrent* terms on those counts. In other words, it appears to us that one interpretation of the trial court's statements was that it attempted to affix free-standing punishments on Molina for using a firearm during the commission of the two attempted murders alleged in counts 3 and 4, while, at the same time, imposing concurrent terms for the attempted murders themselves. That is apparently how the clerk of the court construed the court's pronounced sentences in preparing the abstract of judgment.

The law provides that if the sentence on a count is ordered to be served concurrently, the enhancement appended thereto must also be served concurrently. (*People v. McFarland* (1989) 47 Cal.3d 798, 802, fn. 6; *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583.) Given that Molina's sentence is unauthorized, it must be corrected.

As we have found that the aggregate term imposed on count 2 (30 years to life plus 20 years) was properly ordered to run consecutive to count 1, we need not make any change to the enhancement on that count. However, we find that the two, "consecutive" 20-year enhancements imposed on counts 3 and 4 cannot stand on their own. While the enhancements are properly run consecutive to the sentence imposed on those respective counts, the aggregate terms are run fully concurrent to the terms in counts 1 and 2, thus reducing Molina's sentence by 40 years.

#### **IV. The DNA Testing Fee Must Be Vacated**

Molina contends, the People agree, and we find that the \$20 DNA testing fee must be stricken because the DNA testing fee statute was not enacted until after Molina shot at his victims. (*People v. High* (2004) 119 Cal.App.4th 1192, 1195-1199.)

## **DISPOSITON**

The jury's verdicts finding defendant Michael Molina guilty of one count of first degree murder, and three counts of attempted premeditated murder, along with all of the findings attached to those convictions, are affirmed. As to the sentence on the enhancements in counts 3 and 4 for discharging a firearm (Pen. Code, § 12022.53, subd. (c)), the abstract must be amended so that those terms are ordered to run concurrent. The trial court is directed to forward a corrected abstract of judgment to the Department of Corrections.

## **NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

BIGELOW, P. J.

We concur:

RUBIN, J.

LICHTMAN, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.